Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–76 OF 1999
KC VOHRAH J
10 SEPTEMBER 2001

Civil Procedure *— Specific relief — Application under Specific Relief Act 1950 s 44 — Requirement of leave — Whether leave under O 53 r 1(1) Rules of the High Court 1980 condition precedent to application*

This case dealed with two matters. One related to the preliminary objection by the first defendant that the declaratory prayer by the plaintiff for order compelling the first defendant to perform some statutory duty in its originating summons was misconceived by law. The other related to an application by the second defendant to strike out the originating summons. The first defendant's preliminary objection to the prayer in the proceedings was that in any application for mandamus or an order in the nature of mandamus under s 44 of the Specific Relief Act 1950 ('the SRA'), under O 53 of the Rules of the High Court 1980 ('the RHC) or s 25(2) of the Courts of Judicature Act 1964 ('the CJA'), leave under O 53 r 1(1) of the RHC, as a condition precedent, must be first obtained and this condition has not been fulfilled. The second defendant's application to strike out the originating summons was on the ground that that the plaintiff had not exhausted its remedy under s 71A of the Trade Unions Act 1959.

Held:

(1) Section 44 of the SRA has to be exercised subject to the procedure set out in s 45 of the SRA, but nowhere it is mentioned therein that the procedure therein is subject to any written law or rules of court relating to the same. This is unlike other provisions in the SRA which are expressly made subject to '… the law relating to civil procedure'. There is nothing in ss 44 or 45 of the SRA to say that leave has to be obtained before the application for the remedy is sought for (see pp 621I–622A).

(2) The remedy of an order requiring a specific act to be done or foreborne by, inter alia, a person holding public office which may be given as stated in s 44 of the SRA, exist independently of the remedy of the order of mandamus referred to in O 53 r 1 of the RHC which may be made, or the remedy of the order of mandamus under the additional power given under para 1 of the Schedule to the CJA (see p 622A–B).

(3) An application for consequential relief under para 1 of the Schedule to the CJA cannot be considered unless leave had in the

first place been obtained in an application under O 53 r 1 of the RHC (see p 623E–F).

(4) The Manager of Human Resources and Administration of the plaintiff in his affidavit in reply to the affidavit to strike out the originating summons, clearly alluded to the decision of the first defendant as being a nullity, and this was in relation to material facts which had been pleaded that the first defendant's decision not to take any action on the illegal strike was a nullity. Whether his decision was a nullity would have to be decided at the hearing of the merits of the case and the issue of whether in the context of para (d) of s 44 of SRA, the High Court could not make the order directing the first defendant to make a decision as the plaintiff had other specific or adequate legal remedies that could properly be decided. The application of the second defendant to strike out the summons was dismissed (see p 625E–G, I).

[**Bahasa Malaysia summary**

Kes ini melibatkan dua perkara. Satu berkaitan bantahan awal oleh defendan pertama bahawa permohonan deklarasi oleh plaintif untuk perintah mendorong defendan pertama melaksanakan beberapa kewajipan statutori di dalam saman pemulanya disalah tanggap oleh undang-undang. Satu lagi berkaitan dengan permohonan oleh defendan kedua untuk membatalkan saman pemula tersebut. Bantahan awal defendan pertama terhadap permohonan dalam prosiding adalah bahawa dalam apa-apa permohonan untuk mandamus atau satu perintah bersifat mandamus di bawah s 44 Akta Relif Spesifik 1950 ('ARS'), di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atau s 25(2) Akta Mahkamah Kehakiman 1964 ('AMK'), kebenaran di bawah A 53 k 1(1) KMT, sebagai satu pra syarat, mesti terlebih dahulu diperolehi dan syarat ini tidak dipenuhi. Permohonan kedua defendan untuk membatalkan saman pemula tersebut adalah atas alasan bahawa plaintif tidak menghabiskan remedinya di bawah s 71A Akta Kesatuan Sekerja 1959.

Diputuskan:

(1) Seksyen 44 ARS harus digunakan tertakluk kepada prosedur yang dinyatakan dalam s 45 ARS, tetapi tidak disebutkan di mana-mana bahawa prosedur tersebut tertakluk kepada apa-apa undang-undang bertulis atau peraturan mahkamah berkaitan yang sama. Ini tidak sama dengan peruntukan lain dalam ARS yang dengan nyata harus tertakluk kepada '… undang-undang berkaitan dengan aturcara sivil'. Tidak ada apa-apa dalam ss 44 atau 45 ARS untuk mengatakan bahawa kebenaran telah diperolehi sebelum permohonan untuk remedi tersebut boleh dipohon (lihat ms 621I–622A).

(2) Remedi untuk satu perintah yang menghendaki satu tindakan spesifik dilakukan atau ditanggung oleh, antara lain, seorang yang memegang jawatan awam yang mungkin diberikan sebagaimana yang dinyatakan dalam s 44 ARS, wujud secara berasingan daripada remedi perintah mandamus yang dirujuk dalam A 53 k 1 KMT yang mungkin dibuat, atau remedi perintah mandamus di bawah kuasa tambahan yang diberikan di bawah perenggan 1 kepada Jadual AMK (lihat ms 622A–B).

(3) Satu permohonan untuk relif berkaitan di bawah perenggan 1 kepada Jadual AMK tidak boleh diambilkira kecuali kebenaran telah diperolehi terlebih dahulu di dalam satu permohonan di bawah A 53 k 1 KMT (lihat ms 623E–F).

(4) Pengurus Perhubungan Awam dan Pentadbiran plaintif dalam afidavit jawapan beliau terhadap afidavit untuk membatalkan saman pemula tersebut, dengan jelas menyebutkan bahawa keputusan defendan pertama sebagai satu pembatalan, dan ini adalah berkaitan dengan fakta-fakta penting yang telah diplikan bahawa keputusan defendan pertama untuk tidak mengambil apa-apa tindakan ke atas pembatalan yang tidak sah itu adalah satu pembatalan. Sama ada keputusan beliau adalah satu pembatalan akan diputuskan semasa perbicaraan merit kes dan juga persoalan sama ada dalam konteks perenggan (d) kepada s 44 AMK, Mahkamah Tinggi tidak boleh membuat perintah mengarahkan defendan pertama untuk membuat satu keputusan kerana plaintif mempunyai remedi-remedi lain di sisi undang-undang yang spesifik dan mencukupi yang boleh diputuskan dengan betul. Permohonan defendan kedua untuk membatalkan saman tersebut ditolak (lihat ms 625E–G, I).]

Notes

For cases on specific relief generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5450–5454.

Cases referred to

Chan Mun Poy v Director General of Telecommunications & Anor [1981] 2 MLJ 293 (refd)

Eu Finance v Lim Yoke Foo [1982] 2 MLJ 37 (refd)

Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 (refd)

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors [1990] 3 MLJ 231 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Yap Peng Sang v Menteri Kementerian Sumber Manusia (R1–24–4–96) (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Industrial Relations Act 1967 s 45(1)(a)
Rules of the High Court 1980 O1 r 2(2), O 18 r 19, O 53 r 1(1)
Specific Relief Act 1950 ss 9, 20(2), 43, 44, 45, 46, 51
Trade Unions Act 1959 s 25A(1)(a), (3)(a), (b), (4), 71A, para 1, Schedule

Steven Thiru (*Jack Yow* with him) (*Shook Lin & Bok*) for the plaintiff.
Azizah bte Hj Nawawi (Senior Federal Counsel) for the first respondent.
P Kuppusamy (*P Kuppusamy & Co*) for the second respondent.

KC Vohrah J:. This decision deals with two matters. One relates to the preliminary objection by the Director General of Trade Unions ('the first defendant') that the declaratory prayer by Metro Pacific Sdn Bhd ('the plaintiff') for an order compelling the first defendant to perform some statutory duty in its originating summons is misconceived in law. The other relates to an application by the Timber Employees Union, Peninsular Malaysia ('the second defendant') to strike out the originating summons.

From the originating summons, it appears that the plaintiff's cause of action is founded on a strike which took place on 29 May 1999, initiated by 557 members of the second defendant, who were also employees of the plaintiff. It is not disputed that the second defendant is under the purview of the first defendant, pursuant to the Trade Unions Act 1959 ('the Act').

In essence, the plaintiff's case that the strike was illegal rests on two grounds:

(a) that the second defendant had failed to carry out a strike ballot as required under s 25A(1)(a) of the Act; and

(b) that the strike was predicated on the plaintiff's retrenchment exercise, and by virtue of s 45(1)(a) of the Industrial Relations Act 1967 ('the IRA'), a strike on that basis would be illegal.

In the originating summons, the plaintiff applied for the following orders:

(a) a declaration that the strike held on 29 May 1999 was an illegal strike contrary to s 25A(1)(a) of the Act, and/or s 45(1)(a) of the IRA;

(b) a declaration that because of their participation in the illegal strike, the relevant employees ceased to be members of the second respondent;

(c) a consequential order under s 44 of the Specific Relief Act 1950 ('the SRA') and/or s 25(2) of the Courts of Judicature Act 1964 ('the CJA') and para 1 of the Schedule to the Act, compelling the first defendant to hold that the strike was illegal, and to compel the second defendant to comply with s 25(A)(3)(a), (b) and (c) of the Act, and in default thereof, take action against the second respondent under s 25A(4) of the Act.

It is common ground that the consequential relief prayed for in prayer (c) is a declaratory order in the nature of mandamus.

The first defendant's preliminary objection to the prayer in the proceedings is that in any application for mandamus, leave under O 53 r 1(1) of the Rules of the High Court 1980 ('the RHC'), as a condition precedent, must be first obtained and this condition has not been fulfilled.

The second defendant's application to strike out the originating summons under O 18 r 19 of the RHC is on the ground principally that the plaintiff has not exhausted its remedy under s 71A of the Act.

First defendant's application

The first defendant argues that while the law does not preclude the plaintiff from resorting to different avenues provided by law in order to obtain the remedy sought for, however, whether the application for mandamus or an order in the nature of mandamus is made under s 44 of the SRA, under O 53 of the RHC or under s 25(2) of the CJA, leave of the court as required under O 53 r 1(1) of the RHC, must first be obtained as a condition precedent.

The first defendant relies on the ruling in *Yap Peng Sang v Menteri Kementerian Sumber Manusia* (R1–24–4–96) for this proposition of law:

> So, it is clear from the authorities that whether the application sought is for an order of mandamus as mentioned in O 53 r 1(1) of the Rules of the High Court 1980, or for an order requiring any specific act to be done by any person holding a public office as mentioned in s 44 of the Specific Relief Act 1950, or for directions, orders or writs, including writs of the nature of mandamus as mentioned in para 1 of the Schedule to the Courts of Judicature Act 1964, the leave of the court as required by O 53r 1(1) of the Rules of the High Court 1980 must first be obtained as a condition precedent.

The plaintiff, however, submits that the procedure under s 45 of the SRA which relates to the exercise of the power of a judge under s 44 of the SRA, is not subject to O 53 r 1 of the RHC, or any other statute.

I agree with the argument.

Section 44 of the SRA relates to the High Court judge's power to order a person holding a public office, a corporation or a subordinate court to do certain specific acts. It reads:

A (1) A judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that:

B (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
C (c) in the opinion of the judge the doing or forbearing is consonant to right and justice;
(d) the applicant has no other specific and adequate legal remedy; and
(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a judge —

(a) to make any order binding on the Yang di Pertuan Agong;
D (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or
(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

E It is to be noted that nowhere in the section is the word 'mandamus' used and that under s 46 of the SRA, '(neither) the High Court nor any other court in Malaysia shall hereafter issue any writ of mandamus.' However, the order that may be made, in so far as it relates to a person holding public office, has the effect of making that person perform a public legal duty which is the essence of mandamus.

F Next, s 45 of the SRA, on which the plaintiff relies, must be looked into. It provides the procedure for making the application and the procedure and consequential steps the judge has to adopt in dealing with the application. It will be noted that the procedure is different from the procedure prescribed under O 53 of the RHC relating to the application for an order of mandamus, prohibition or certiorari, and the steps the judge has to take
G in dealing with the application. Section 45 of the SRA reads:

> Every application under s 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof; and a judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why
H the order applied for should not be made. If, in the last case, the person, court, or corporation complained of shows no sufficient cause, the judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the judge fixes in this behalf.

I It has to be noted that s 44 of the SRA has to be exercised subject to the procedure set out in s 45 of the SRA, but nowhere is it mentioned therein that the procedure therein is subject to any other written law or rules of court relating to the same. This is unlike other provisions in the SRA which

are expressly made subject to '… the law relating to civil procedure' (see ss 9, 20(2), 43 and 51 of the SRA). There is nothing in ss 44 or 45 of the SRA to say that leave has to be obtained before application for the remedy is sought for.

My view is that the remedy of an order requiring a specific act to be done or foreborne by, inter alia, a person holding public office which may be given as stated in s 44 of the SRA, exists independently of the remedy of the order of mandamus referred to in O 53 r 1 of the RHC which may be made, or the remedy of the order of mandamus under the additional power given under para 1 of the Schedule to the CJA.

I am aware that in *Chan Mun Poy v Director General of Telecommunications & Anor* [1981] 2 MLJ 293, a High Court case, it was held that since 1 June 1980, after the coming into force of the RHC, leave of the court would be required under O 53 r 1(1) of the RHC before an order for mandamus could be sought. With respect, I think it was not drawn to the attention of the court O 1 r 2(2) of the RHC as it stands now and as it stood in 1980 and at the date of the decision:

> 1 Citation and commencement (O 1 r 1)
>
> …
>
> 2 Application (O 1 r 2)
>
> (1) Subject to the following provisions of this rule, these rules shall have effect in relation to all proceedings in the High Court, including any pending proceedings herein.
>
> (2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made *under any written law for the specific purpose of such proceedings* or in relation to any criminal proceedings.
>
> (3) In the case of proceedings or which rules have been made, nothing in para (2) shall be taken as affecting any provision of any rules (whether made under the Act or *any other written law*) by virtue of which the Rules of the High Court 1980 or any provisions thereof are applied in relation to any of those proceedings. (Emphasis added.)

As a matter of record, O 53 was amended in 2000 by the Rules of the High Court 2000 (PU(A) 342/2000) after the originating summons was filed, and it is quite clear from O 53 r 1 that the order 'is subject to the provisions of Chap VIII of Part 2 of the SRA' (which includes ss 44 and 45 of the SRA) meaning that the remedy under s 44 and the procedure for applying for the remedy are not subject to O 53.

I now come to the prayer which relates to a consequential order to be made under s 25(2) of the CJA and para 1 of the Schedule to the Act.

The objection to that prayer is on the ground again that no leave has been obtained under O 53 r 1 of the RHC, bearing in mind the proviso to s 25(2) of the CJA which reads:

> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same and O 53(1) as it stood at the time of filing of the case provided that no application for an order of, inter alia,

mandamus shall be made unless leave therefore had been granted under the rule.

The plaintiff points to *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 where Edgar Joseph Jr FCJ stated that the power to grant public law remedies envisaged by para 1 to the Schedule to the CJA cannot be limited by the RHC.

From the reading of the judgment on that case it is, however, obvious that his Lordship meant that no inroads can be made into the area of substantive law, but clearly his Lordship recognized (at p 223) that the procedure to move the application for the prerogative orders (powers additionally conferred on the High Court by para 1 to the Schedule to the CJA) shall be in accordance with the requirements of O 53 of the RHC.

The distinction between the aspects of procedural law and substantive law touched upon in this case was summed up by his Lordship thus (at p 223):

> It follows, therefore, that while our O 53 can only prescribe the procedure and practice to be followed by parties when applying for Judicial Review, the source of power enjoyed by our courts to grant relief in Judicial Review proceedings is the prerogative jurisdiction inherited from the United Kingdom courts and, most importantly, para 1 of the Schedule read with s 25 of the Courts of Judicature Act 1964. The proviso to s 25(2), and more particularly, the Rules of the High Court 1980, do not — and indeed cannot — narrow down or diminish or curtail the scope of the powers conferred upon our courts in judicial review proceedings.

It follows that the application for consequential relief under para 1 of the Schedule to the CJA filed on 26 November 1999 cannot be considered unless leave had in the first place been obtained in an application under O 53 r 1 of the RHC, as it stood at date of the application. In any event, under the new O 53 r 2 of the RHC, an application for any of the reliefs specified in para 1 of the Schedule to the CJA shall be in a prescribed form and no application under the order shall be made unless leave has been granted (r 3(1)).

I therefore agree with the plaintiff that the relief prayed for under para 1 to the Schedule to CJA cannot be considered and I strike out the reference to it.

Second defendant's application

The second defendant has applied to strike out the originating summons on the ground that it discloses no reasonable cause of action and that otherwise it is an abuse of process.

I do not propose to go into the details as to the facts of the case which the first defendant says disclose no reasonable cause of action. Suffice it to say the second defendant states that the issue raised in the originating summons had been resolved or settled and that there is therefore no utility

in the relief sought by the plaintiff. Additionally, it is argued, that since there is a specific remedy or appeal procedure prescribed under s 71A of the Act, a declaratory judgment cannot be issued by the court.

Let me first deal with the argument that the plaintiff should have exhausted alternative remedies.

The provision which the second defendant refers to is reproduced below:

> (1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be given, made or effected by the Registrar under any of the following provisions:
> (a) s 2(2);
> (b) s 12;
> (c) s 15(2)(b) or s 15(4);
> (d) s 16(1);
> (e) s 17(1);
> (f) s 25A(4);
> (g) s 28(1)(d) or s 29(2)(b);
> (h) s 34(2);
> (i) s 40(6) or s 40(9);
> (j) s 54(1);
> (k) s 76A(1); or
> (l) s 76(1).
>
> may, within 30 days from the date of the opinion, order, declaration, refusal cancellation, withdrawal, direction or decision of the Registrar, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

The plaintiff argues that s 71A of the Act is couched in discretionary terms, and accordingly, it is not mandatory for the plaintiff to appeal to the Minister over the failure of the first defendant to exercise his statutory duty to take action on the illegal strike. Reliance is placed on *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors* [1990] 3 MLJ 231, where it is said that the High Court held that the use of the word 'may' meant that the domestic remedy was not the only remedy open to the litigant, and on *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41 where it was held that the court will not make a declaratory judgment where an adequate alternative is available.

In regard to the case cited by plaintiff, *Kesatuan Pekerja Pembuatan Barangan Galian Bukan Logam*, it is incorrect to say that the court held that the word 'may' meant that the domestic remedy was not the only remedy open to the litigant. The court interpreted the word 'may' in respect of sections other than s 71A of the Act, and in regard to s 71A of the Act in an obvious reference to the remedy of appeal under s 71A of the Act (see p 235 at D left column, the same section that is being considered here) the court has this to say, at p 238:

> As for the point that the plaintiff should have availed itself of the remedy of appeal provided for in the Trade Unions Act 1959, I propose disposing of this ground by referring to the well known line of authorities which establish the proposition that when, as here, it is alleged that a decision is a nullity, a plaintiff is not bound to resort to the remedy of an appeal but may instead have recourse to collateral proceedings to attack the decision.

His Lordship Edgar Joseph Jr J (as he then was) then referred to *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 and *Eu Finance v Lim Yoke Foo* [1982] 2 MLJ 37 for this principle of law.

In a further development of this principle, his Lordship in another case, this time a Federal Court case *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 at p 39, after an analysis of English cases, had this to say:

> Speaking generally, it is right to say that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather than appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest (*R v Huntingdon District Council; ex p Cowan & Anor* [1984] 1 WLR 501 (a licensing appeal)).

It is thus in the context of the further development of the principle that the case of *Manggai* has to be viewed.

It will be noted that the Manager of Human Resources and Administration of the plaintiff in his affidavit in reply to the affidavit to strike out the originating summons, clearly alludes to the decision of the first defendant as being a nullity, and this is in relation to material facts which had been pleaded that the first defendant's decision not to take any action on the illegal strike is a nullity. Whether his decision is a nullity, to my mind, will have to be decided at the hearing of the merits of the case and the issue of whether in the context of para (d) of s 44 of the SRA, the High Court cannot make the order directing the first defendant to make a decision as the plaintiff has other specific or adequate legal remedies that can properly be decided.

And in regard to the merits of the case, that brings me to the argument by the first defendant that the issue of the retrenchment has been settled between the plaintiff and the employees, and that there is no basis for the action. It is, however, the submission of the second defendant that the settlement agreement does not cover the illegal strike or the legal consequences of it, and it is pointed out that the settlement does not even mention the illegal strike. These are matters to be determined at the hearing of the merits of the case.

In the result, I overrule the objection of the first defendant and dismiss the application of the second defendant to strike out the summons, save that in regard to the objection raised by the first defendant, the reference in prayer (c) of the originating summons to a consequential order under

s 25(2) of the CJA and para 1 of the Schedule to the Act is struck out. Costs in the cause.

Order accordingly.

Reported by Wong Siok Chin